Judge of the said Superior Court (R. 152) and before the Supreme Court of the State raised questions of the constitutional validity of the said income tax statute as applied to the appellant Railway, on the ground that the statutory assumption that the ratio of expenses to gross revenues within the State of North Carolina is approximately the same as system ratio of operating expenses to operating gross revenues is unfounded in fact and in the record and results in an arbitrary finding of North Carolina taxable net income which does not exist. The result of the State's interpretation of its income tax statute as applied to the case of appellant is, as was in due time set up and claimed, a taking of property in violation of the due process clause of the Fourteenth Amendment and a burden upon interstate commerce in violation of the Commerce Clause (Section 8 of Article I) of the Constitution of the United States. The final judgment of the State Supreme Court was in favor of the validity of the State statutes as against the appellant's question of their validity on the ground that as construed they were repugnant to the Federal Constitution in the particulars specified.

On detailed findings of fact the Referee found that the expenses of the operation of the appellant's branch lines in the State in the years 1927, 1928 and 1929 (appellant has no main line in North Carolina) were greater than the gross operating revenues during each of those years (R. 91). He concluded that the application of the system ratio of operating expenses to gross revenues bears unconstitutionally upon the appellant Railway and that the Railway is entitled to recover the income taxes paid to the State in those years.

The State Commissioner of Revenue thought, and the State contended in the State courts, that although the appellant Railway had correctly reported gross revenues within the State in accordance with the statutory prescrip-

tion and though the operating expenses on the North Carolina branch lines of appellant are substantially greater relatively than the operating expenses on appellant's main line outside of North Carolina, the level of freight rates on North Carolina branches is much higher than on other portions of the appellant Railway's system (R. 31). Over the objection of the appellant Railway the State attempted to prove an actual gross revenue from the alleged higher rate level and undertook to disregard the gross revenues attributable to North Carolina in the manner prescribed by the income tax statute. Assuming that the State might disregard the statutory method of ascertaining gross North Carolina revenues, the Referee found that the State had failed to prove "actual" gross revenue in excess of the amount ascertained by the statutory method—that "no data was furnished by which any amount of alleged excess could even be approximated" (R. 88).

Nevertheless the Judge of the Wake Superior Court on such a record, without overruling the specific findings and conclusions of the Referee's report which was under review, surmised:

> "The evidence seems persuasive that if the actual gross operating revenues should be determined, the amount returned by defendant" (appellant Railway) "would be increased by a much greater proportion than the operating expenses in North Carolina are increased over the operating expenses determined by the use of the statutory formula" (R. 151).

Accordingly, the said Superor Court overruled the findings of fact and conclusions of law of the Referee and entered judgment for the State in the amount of the income taxes. On appeal the Supreme Court affirmed the judgment upon the erroneous statement that the said Superior Court

below had found supporting facts in support of the judgment and in effect declined to review the record.

The appellant Railway represents that the above described rulings and action of the courts below result in arbitrary and unsupported taxation of alleged net income which does not exist within the jurisdiction of the taxing State and that the State income tax statute as construed and applied results in the case of the appellant Railway in the taking of property without due process of law and an unconstitutional burden on interstate commerce.

Cases having the same jurisdictional features which this Court has reviewed and decided, which appellant Railway cites in support of the jurisdiction here, are: *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell, Commissioner,* 283 U. S. 123, and *Kenney Manufacturing Co.* v. *Maxwell, Commissioner of Revenue of North Carolina,* 291 U. S. 642, *per curiam.* To the same jurisdictional effect are: *Kansas City Southern Railway Co.* v. *Road Improvement District,* 266 U. S. 379, 385, and *Safe Deposit and Trust Co.* v. *Virginia,* 280 U. S. 83, 89.

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